IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 595

H. B. LEWIS and D. M. LEWIS, co-partners, trading and doing business as M. G. LEWIS AND SONS GARAGE, and D. M. LEWIS, as executor of the estate of M. G. LEWIS deceased,

Petitioners,

v.

THE STATE ROAD DEPARTMENT OF FLORIDA, et al., THE APALACHICOLA-NORTHERN RAILROAD, a Florida corporation, and the ST. JOE PAPER COMPANY, a Florida corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE CIRCUIT COURT FOR LEON COUNTY, FLORIDA

CLAUDE PEPPER
Counsel for Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE CIRCUIT COURT FOR LEON COUNTY, FLORIDA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida,

entered in the above-entitled case on April 24, 1957, a rehearing in which was denied by said court on June 5, 1957. The record in this case is lodged with the Circuit Court for Leon County, Florida.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida and the order denying the petition for rehearing are reported in 95 So. 2d 248.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 24, 1957. A timely petition for rehearing filed on May 18, 1957 was denied on June 5, 1957. Petitioners' application for an extension of time within which to apply for a writ of certiorari was granted on September 3, 1957 and such time was extended to November 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since a right and privilege are claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether the State Road Department of Florida may permit one abutting owner to extend its railroad facilities across a public highway, thereby obstructing it, and then build an overpass and change the grade of the highway to clear this obstruction without compensating another abutting owner whose property will be severely damaged as a result of the change of grade.

CONSTITUTIONAL PROVISION INVOLVED

Involved herein is that part of the 14th Amendment to the Federal Constitution which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

STATEMENT

On November 6, 1953 petitioners filed a complaint in the Circuit Court for Leon County, Florida alleging, *inter alia*, that: (1) they were and had been since 1928 abutting owners on State Road 30 and used their property for the operation of a garage, cafe and display room; (2) the respondent Paper Co., also an abutting owner, was served by its wholly-owned subsidiary, the respondent Railroad, which had two existing tracks crossing said highway and entering the Paper Co.'s premises; (3) as then operated the railroad tracks did not constitute an obstruction to traffic nor create a substantial traffic hazard; (4) desiring to expand its railroad car switching and storage yards across the highway, the Railroad and Paper Co. had requested and received permission from the respondent State Road Department to lay additional railroad tracks across said highway; (5) the additional tracks would completely obstruct the highway and necessitate the construction of a viaduct or overpass over the tracks; (6) the overpass would set up a concrete wall 22 feet high and 18 feet from petitioners' show windows thus obstructing ingress and egress to petitioners' place of business, hiding petitioners' building and show room, and destroying their value as a business site; and (7) the construction of the proposed viaduct was not a public project, but a construction for a private purpose, made necessary by collusion of the Railroad and Paper Co. with the State Road Department. Petitioners prayed that the court enjoin re-

spondents from laying the additional tracks, from building any overpass or viaduct, or from changing in any way the elevation of the highway. ("Appendix to Brief of Appellants", pp. 1-10, filed herewith and abbreviated hereinafter as "A"). Respondents' motions for summary final decree were denied on the ground that the complaint had equity (A. 14, 15), and a temporary injunction was issued (A. 10-12). The Supreme Court of Florida denied respondents' petition for a writ of certiorari on the ground that a material issue of fact was presented, and also denied respondents' petition for a rehearing. 79 So. 2d 699. Thereafter a Special Master was appointed to take testimony on the material issues in the case, and his Report was filed on January 5, 1956 (A. 16-31). The Special Master concluded, *inter alia*, that: (1) the change in elevation of the highway would damage petitioners' consequential rights to light, air and view and would divert considerable traffic from passing petitioners' property; (2) the construction of the overpass had been legally authorized and constituted a lawful use or improvement of the highway, and therefore was not an unconstitutional taking of private property, even though petitioners' rights of light, air and view were destroyed and said traffic diverted; and (3) construction of the overpass did not proceed from the laying of additional tracks across the highway but proceeded from a matter of public safety and welfare. The Special Master also found against petitioners' contention that construction of the overpass was primarily for the benefit of the Paper Co. and only incidently for the benefit of the travelling public. (A. 23-31). Petitioners exceptions to the Special Master's Report were overruled by the Circuit Court, which accepted the Report, dissolved the temporary injunction, and dismissed petitioners' complaint, (A. 49-52). Petitioners thereupon ap-

pealed to the Supreme Court of Florida (A. 52), which affirmed the decree of the Circuit Court. 95 So. 2d 248.

How Federal Question Is Presnted. Petitioners first raised the Federal question in their "Original Bill of Complaint and Petition for Temporary Injunction", alleging that respondents' actions would "amount to a taking of plaintiffs' property without compensation and without due process of law, contrary to the provisions of . . . the 14th Amendment to the Constitution of The United States." (A. 9). Petitioners again raised this question in their "Exceptions to Special Master's Report", alleging that respondents' actions "would constitute a taking of plaintiffs' easements of air, light, view and access within the prohibition of . . . the 14th Amendment to the Constitution of The United States." (A. 33). All of said exceptions were overruled by the Circuit Court of Leon County in its final decree dated March 7, 1956. (A. 49-52). Petitioners raised this question again in their "Assignments of Error" to the Supreme Court of Florida, urging upon said Court that the Circuit Court "erred in failing to find that, under the circumstances of this cause, construction of the proposed overpass constitutes a taking of plaintiffs' easements in and to State Road 30 within the prohibition of . . . the due process clause of the Fourteenth Amendment to the Constitution of The United States." (A. 54). The opinion of the Supreme Court of Florida, 95 So. 2d. 248, did not expressly mention this constitutional question. However, said Court on September 26, 1957 entered a certification of this Federal question, a copy of which is filed herewith, stating that: (1) in said appeal and in the arguments, both oral and by brief, it was insisted and relied upon by the petitioners, that the State Road Department violated petitioners' rights to due process of

law under the 14th Amendment to the United States Constitution; (2) said Federal question was seasonably raised in the prosecution of this cause; (3) it became necessary and material to the determination and disposition of this cause in said Court to determine said question; and (4) said question was determined adversely to petitioners.

REASONS FOR GRANTING THE WRIT

1. From the beginning of its operations in 1937 the Railroad and Paper Co. utilized the highway as a switchyard. The Railroad at that time laid a spur track across the highway immediately north of petitioners' business site leading to the woodyard of the paper mill, and immediately before reaching the highway this spur divided into two tracks, one of which, after crossing the highway fanned out into six tracks. (A. 92) Three of these tracks lay along one side, and three along the other, of a chain conveyor in the woodyard, and in order for the Paper Co.'s locomotive cranes, which were used to load and unload pulpwood, to proceed from one side of the conveyor, they had to cross the highway, throw a switch and then recross the highway. This arrangement is illustrated in Diagram No. 1, Appendix A. Subsequent developments make it eminently clear that the eventual obliteration of this portion of State Road 30 as a *public* thoroughfare was brought about by the plans of the Railroad, together with the Paper Co., to appropriate the highway for their own *private* purpose.

In 1950-1951 prior to reciving permission from the State Road Deparment to lay the new railroad crossings, the Paper Co. had instituted a $30,000,000.00 expansion

program to *triple* its productive capacity (A. 90), and it was this very expansion of its facilities that created the need for additional trackage. (A. 19). As a first step in the respondents' protracted, and eventually successful, efforts to obtain favorable political consideration for carrying out their private purpose, Mr. J. L. Sharit, Vice-President of the Railroad, went directly to the Governor of Florida himself in order to have a state engineer look into the matter of constructing an overhead crossing. (A. 84). Mr. Sharit subsequently appeared before a meeting of the State Road Department on January 18, 1952, and the minutes of that meeting reveal that Mr. Sharit stated then and there that the expansion program:

> "would call for additional space both for storage and for the increased loading and shipping facilities. He explained [to the Department] that there is no room for this necessary extension of their grounds without making use of land lying across the highway, which would necessitate almost constant crossing of the highway by trucks and other vehicles and by railroad cars, greatly increasing the traffic hazards in the area. He suggested that if the State could construct an overpass at this point it would contribute much toward safety of traffic on the highway at this point." (A. 85)

Mr. Sharit even suggested that "perhaps a detour of the road could be built around the crossing, if the construction of an overpass did not seem practical." (A. 85). Again on January 31, 1953, Mr. Sharit wrote the State Road Department that:

"This is a most urgent project and needs immediate attention, and I hope that you and your Honorable Board will look with favor on the placing of this over-pass.

"We need to get the tracks in their location so that there will not be any great amount of expense involved if and when the over-pass is put in, and at such time as you can, send your engineer down to make a survey of this over-pass and let me know so that the proper location of our facilities can be made." (A. 91).

So great was the Railroad's need for this project that Mr. Sharit repeatedly pressed the State Road Department to authorize the laying of the additional tracks and to authorize construction of the over-pass. (A. 90, 97-98, 106-108). Thus, on August 11, 1953, Mr. Sharit wrote the State Road Department that:

"Our tonnage to and from the Mill is increasing daily and will, before too long, be very, very heavy and the quickest possible date for the completion of this overpass is urgently needed so as to prevent delays and/or hazards to the traveling public." (A. 107).

As to these hazards, the Special Master himself found that:

"It is anticipated that there will be at least *100 train crossings per day on account of the expansion program recently completed by the St. Joe Paper Co.* . . . which would make the crossing

extremely dangerous for the traveling public." (A. 23). (Emphasis supplied).

On August 14, 1953 the State Road Department advised Mr. Sharit that prior to going ahead with the construction of the overpass it was necessary to establish an equitable basis for apportioning the costs of the project, that the State Road Department would be willing to bear the cost of so much of the overpass as was needed to clear the existing two tracks, but that the full cost of the additional structure which would be required because of the laying of the additional tracks "should be borne by the Railroad, as it will be the sole beneficiary of this track expansion." (A. 110). By letter dated August 22, 1953 Mr. Sharit advised the State Road Department that the Railroad agreed to this scheme of apportioning costs. (A. 111). It must be noted, however, and it is necessary to keep clearly in mind, that the State Road Department never determined to build an overpass over the *two original tracks*, nor did the Railroad and Paper Co. ever propose or the State Road Department ever determine to build the additional tracks *alongside* the two original tracks. The Railroad and Paper Co. proposed to take up the two original tracks and construct a *totally new layout*, and at a point removed from the two original tracks, and all for the purpose of accommodating its tripled expansion program. (A. 40, 60, 61, 62). Moreover, the Federal government refused to pay for any portion of the new highway construction which would traverse the new track layout (A. 38), and this refusal confirms, rather than negatives, the petitioners' conclusion that the construction project was in truth for the respondents' private benefit and was necessitated by respondents' private expansion program.

Subsequently, on October 21, 1953 the State Road Department authorized the Railroad to begin construction of the additional trackage. (A. 113). On October 30, 1953 the State Road Department advised counsel for the petitioners that the granting of such authority was "the first step toward the erection of the overpass." (A. 115). The ultimate obliteration of this portion of State Road 30 is illustrated in Diagram No. 2, Appendix A, which shows the new tracks laid by the Railroad, the overpass, and the 22-foot crib wall in front of petitioners' business site. Upon the respondents' refusal to make proper compensation for the consequent damage to petitioners' property, the present action was brought against them.

Petitioners submit that the State Road Department in authorizing the construction of the overpass and change of grade did so for the primary purpose of accommodating the expansion of the facilities of the Railroad and Paper Co., and that such action, with its consequent damage to petitioners, amounts to an unconstitutional taking of petitioners' private property, not for a public, but for a private purpose. Petitioners submit that the Court below was clearly erroneous in accepting the Special Master's finding that the authorization for the laying of additional tracks and construction of the overpass were not primarily for the benefit of the Railroad and Paper Co., for the record is bare of evidence that the State Road Department had ever planned to construct an overpass over the original two tracks. The Special Master's conclusion that "the construction and desirability of constructing the proposed overpass proceeds from the necessity to eliminate a highway hazard and is for the public welfare" (A. 30), ignores the essential facts in the chronology of events leading to the construction of the overpass. That

conclusion ignores the fact that it was the respondents' expansion program which produced the need for additional trackage, ignores the fact that if additional trackage were to be laid an overpass would have to be built to correct the almost total resultant obstruction of the highway, and ignores the fact that faced with these needs the respondents pressured and succeeded in inducing the State Road Department to authorize the laying of the additional trackage and to authorize the construction of the overpass. It is therefore altogether plain that the respondents' private project was the proximate cause of the obliteration of the highway as a public thoroughfare, and that the overpass project did *not* begin as a "safety" measure, but was in truth nothing more than a blatant accommodation by the State Road Department of the respondents' private interests.

Moreover the Special Master's conclusion that the construction of the overpass had "been authorized by the proper administrative board having control of the public highways of this State" (A. 27), completely ignores the crucial question of whether the *statutory* authority of the State Road Department could, as a matter of *constitutional* law, be exercised, as it was in this case, consistently with the Fourteenth Amendment.

2. That this Court may and should examine the record in this cause is clear from the ruling in *Norris v. Alabama*, 294 U. S. 587, 589; 55 S. Ct. 579, 580; 79 L. Ed. 1074, 1077 (1935), where the court stated:

> "That the question is one of fact does not relieve [this Court] of the duty to determine whether in truth a federal right has been denied. When

> a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights."

Accord: *Great Northern Ry. Co. v. Washington*, 300 U. S. 154; 57 S. Ct. 397; 81 L. Ed. 573 (1937).

3. Since it does not appear that this Court has ever had occasion to rule upon a case on all fours with this one, the question presented, insofar as this Court is concerned, appears to be *res nova*. At most this Court has only observed by dictum that:

> "It has been held in nearly every State in the Union that 'there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law'." *U. S. v. Willow River Power Co.*, 324 U. S. 499, 511; 65 S. Ct. 761, 768; 89 L. Ed. 1101, 1112 (1945).

Petitioners' contend that the construction in this case was not "authorized by law" since the State Road Department's action was in contravention of the 14th Amendment, and that the building of such a viaduct is no "mere" change of grade; hence the ruling of The Supreme Court of Florida is in conflict with this Court's dictum. More-

over, the Special Master's conclusion, which was adopted by The Supreme Court of Florida (95 So. 2d 248, 255), that since the State Road Department acted pursuant to *statutory* authority the construction of the overpass was "legally authorized", ignores the proposition that no state statute can be applied in violation of the 14th Amendment. Hence the statutory authority of the State Road Department is itself rendered unconstitutional by virtue of the manner in which it was *applied* in this case by administrative construction.

4. Since, as petitioners view the facts, the State Road Department's action amounts to a taking of private property for a private purpose, the ruling of the Court below results in a conflict with the general principle, established long ago by this Court, that:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States." *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 417; 17 S. Ct. 130, 135; 41 L. Ed. 489, 495 (1896).

4. The ruling of the Supreme Court of Florida also conflicts with the only other ruling on this precise issue which appears to have been made in any other jurisdiction, namely, the ruling in *City of Gary v. Much*, 94 N. E. 583 (Appellate Court of Indiana, 1911), affirmed on other grounds 180 Ind. 26, 101 N. E. 4 (1913). That was an action by an abutting owner to enjoin the city from vacating and destroying a highway which was the plaintiff's

only means of ingress and egress. The evidence showed that a highway had been vacated for the *purpose* of enabling several railroads to lay tracks across it and convert it into an exchange yard in order to facilitate the handling of the products of a private steel company. Although the city claimed that the vacation would relieve it of a "burden" of a street with numerous railroad tracks crossing it, the Court found that the burden was one which would develop only after the streets were occupied by the railroad and was not a burden existing at the time the vacation proceedings were considered. The Court concluded that the vacation was for a private and not a public purpose and therefore enjoinable.

Furthermore, as it was stated in *Kessler v. City of Indianapolis*, 157 N. E. 547 (Ind., 1927), where:

> "The intention to confer a private use or benefit forms the purpose or a part of the purpose of the proceding or taking the power of eminent domain may not be exercised."

5. The question involved is of particular public importance in that a state agency has allowed a substantial portion of a public highway to be completely appropriated for the benefit of a private railroad and paper mill. Moreover, in view of the tremendous highway expansion program that has recently been initiated by the state and federal governments, similar situations could develop in many parts of the nation, should this Court decline to review this case and decline to overrule the Court below, where politically influential landowners could, by collusion with local authorities, instigate highway construction projects which would be economically disastrous to other abutting owners who enjoy no such political favoritism.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAUDE PEPPER
Counsel for Petitioners

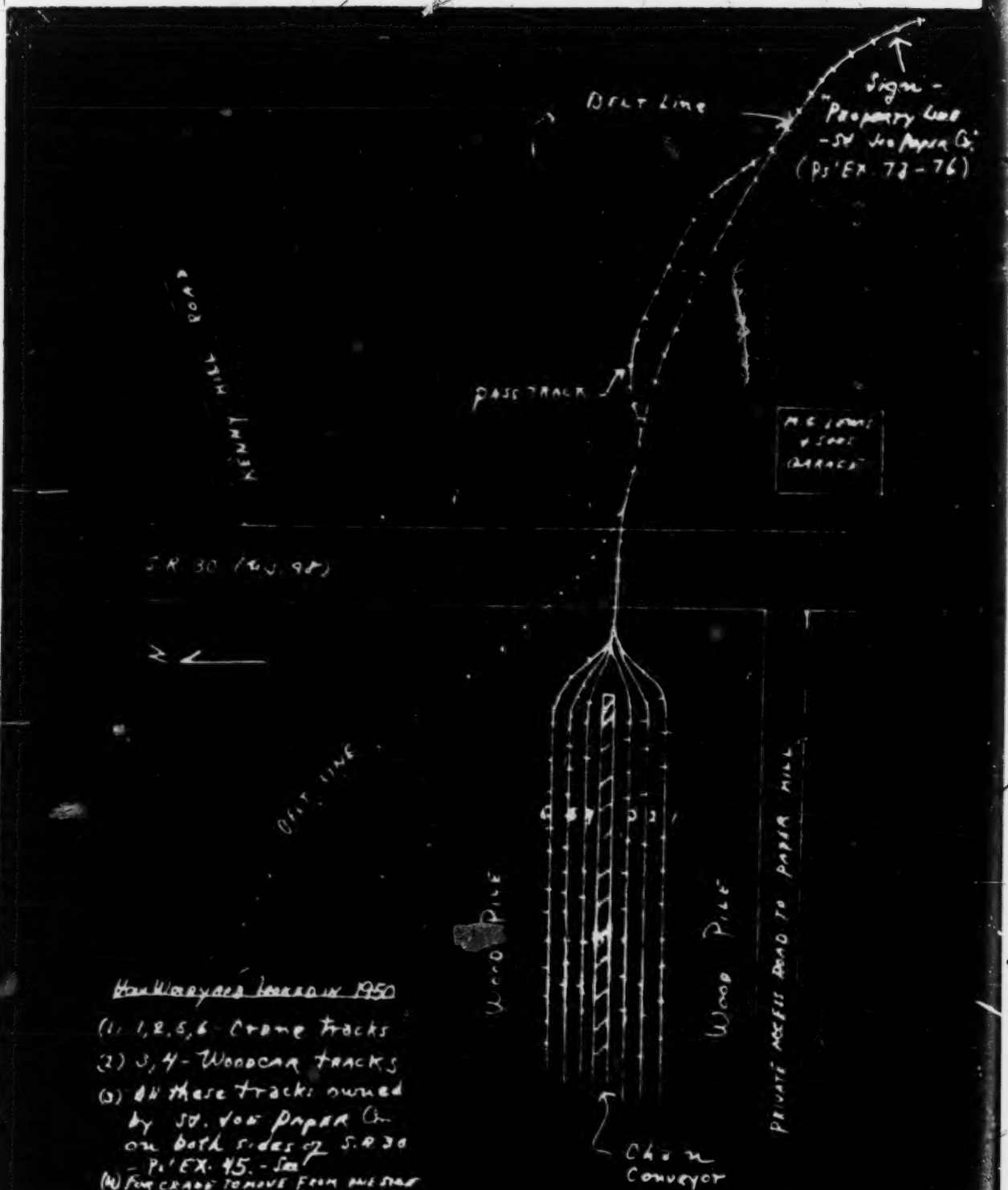
October_____, 1957

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for a writ of certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, has been served by mail upon Meginnis, Thompson & Morrison, 123½ South Monroe Street, Tallahassee, Florida, attorneys for respondents, St. Joe Paper Co. and Apalachicola-Northern Railroad, and to Bryan W. Henry, Holland Building, Tallahassee, Florida, attorney for respondent State Road Department of Florida, by mail this

_____day of_____, 1957.

CLAUDE PEPPER



Hardwood Yard Layout 1950

(1) 1, 2, 5, 6 - Crane tracks

(2) 3, 4 - Woodcar tracks

(3) All these tracks owned by So. Jo. Paper Co. on both sides of S.R. 30 - Ps'Ex. 45. - See

(4) Fork crane to move from one side to other of conveyor, S.R. 30 must be crossed.

Diagram No 1

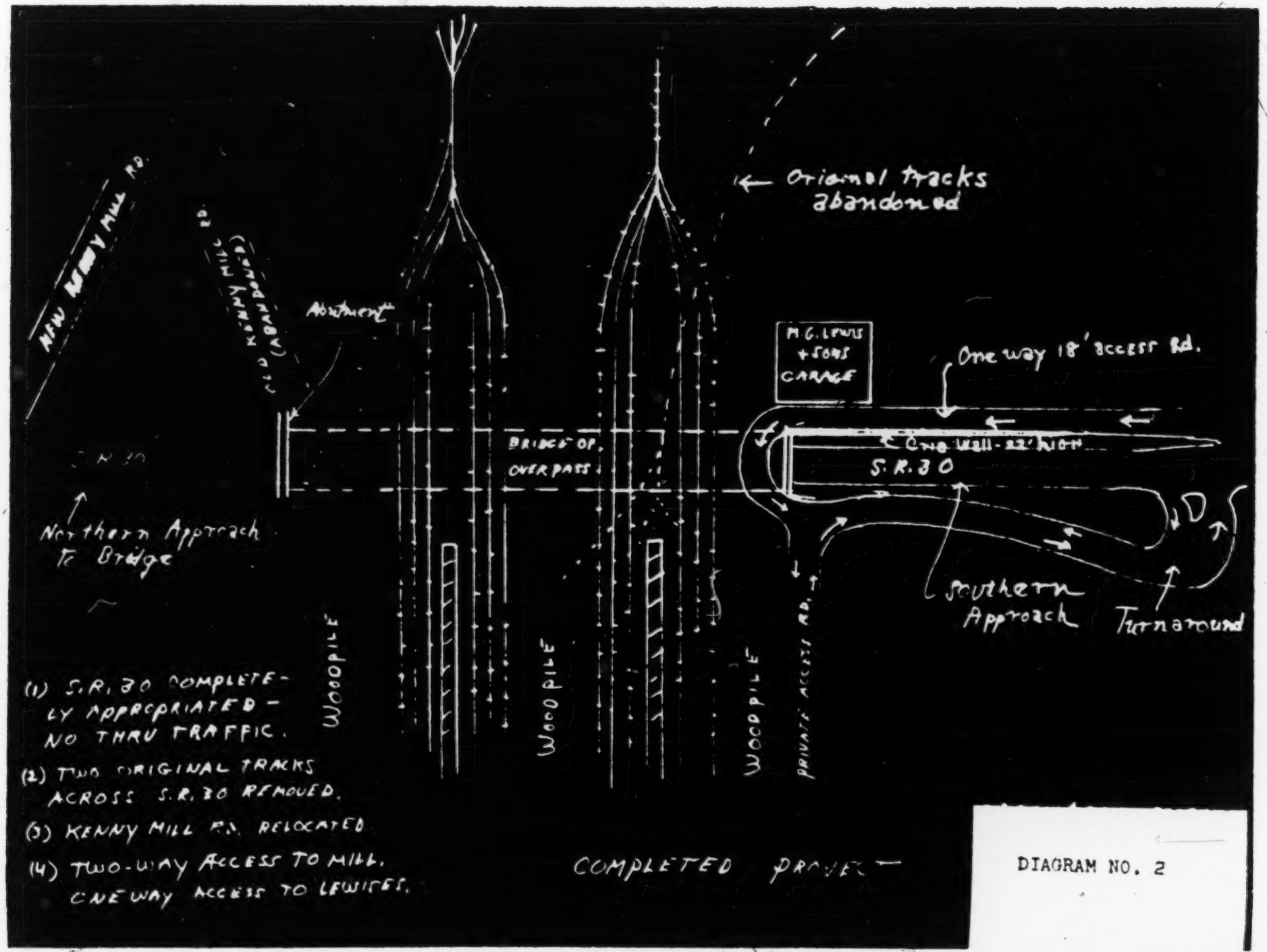

NEW KENNY MILL RD.
OLD KENNY MILL RD. (ABANDONED)
ABUTMENT
← Original tracks abandoned
M.G. LEWIS + SONS GARAGE
One way 18' access Rd.
BRIDGE OF OVERPASS
Conc. Wall - 22' High
S.R. 30
Northern Approach to Bridge
WOOD PILE
WOOD PILE
WOOD PILE
PRIVATE ACCESS RD.
Southern Approach
Turnaround
(1) S.R. 30 COMPLETELY APPROPRIATED - NO THRU TRAFFIC.
(2) TWO ORIGINAL TRACKS ACROSS S.R. 30 REMOVED.
(3) KENNY MILL RD. RELOCATED
(4) TWO-WAY ACCESS TO MILL. ONE-WAY ACCESS TO LEWISES.
COMPLETED PROJECT

DIAGRAM NO. 2

APPENDIX B — OPINION BELOW

ROWE, Associate Justice.

On November 6, 1953, the plaintiffs filed their bill of complaint in the Circuit Court for Leon County, Florida, against the defendants, alleging that plaintiffs then and since 1928 owned property adjacent to and abutting on U. S. Highway 98 (State Road 30) for a distance of about 300 feet, and is used for the operation of a business known as M. G. Lewis and Sons Garage for the sale and servicing of motor vehicles, sale of gasoline and lubricants, and cafe; that the business is housed in one building by reason of which automobiles displayed in the building may be seen by persons traveling on said Highway; that the principal surfaced street of Port St. Joe, Florida, enters said Highway at a point adjacent to the above property; that said street is used by approximately 95% of the workers going to and from a paper mill operated in Gulf County, Florida, by the St. Joe Paper Company; that said paper mill is west of the Highway,—the entrance to the premises of the paper company being directly across the Highway from plaintiffs' property; that the paper mill is served by the said Railroad Company, which is wholly owned by the said Paper Company,—said Railroad Company, which is wholly owned by the said Paper Company, —said Railroad Company presently having two tracks crossing the Highway and entering the Paper Company's premises on the West side of the Highway; that as presently operated the railroad does not constitute an obstruction to traffic upon said Highway and does not impose upon said Highway an undue burden, nor does the railroad create any substantial traffic hazard, and no necessity presently exists for the construction of a viaduct

by which the Highway and its traffic would be carried over the railroad tracks; that the presently owned railroad yards of the Paper Company are on the west side of the Highway; that, however, desiring to extend its railroad car switching and storage yard in an easterly direction across the Highway, the Paper Company has caused the Railroad Company to request permission of the State Road Department to lay 12 additional tracks across the Highway, so as to fan out from the present two spur tracks; that although the defendants have been warned by plaintiffs that their property would be damaged and that public property would be diverted to private use if the 12 tracks should be laid across the Highway and a viaduct should be constructed to carry traffic over the said tracks, the State Road Department has attempted to authorize the defendant Railroad to construct the said 12 additional tracks across said Highway; that the Railroad is presently engaged in extending additional tracks across the Highway; that the proposed additional tracks (together with the existing two tracks, or a total of 14 tracks) will constitute a complete and total obstruction of traffic along the Highway, thereby obliterating and appropriating said Highway to private use so that it will become necessary to erect a viaduct over said tracks at great expense to the people of the State of Florida and at practically no expense to the Railroad and none whatever to the Paper Company; that the construction of the proposed viaduct is not a public project, but a project made necessary by the Railroad and Paper Company's collusion in extending its railroad car switching and storage yard; that the proposed viaduct is not being constructed for any road or highway purpose but for a combined railroad and paper mill purpose; that if the Railroad is permitted to continue with its purpose to obstruct

the Highway, and if it thereby becomes necessary for a viaduct to be constructed, said viaduct or overpass will set up a concrete wall approximately 18 feet from the plaintiff's show windows and would be approximately 22 feet high, and would result in irreparable injury to the business of plaintiff's in that A. "Plaintiffs would no longer have the right of ingress and egress to and from the Highway at all points along their 300 foot frontage upon said Highway. B. The plaintiffs' building and show room would be completely hidden by said overpass, and its value as a business site completely destroyed. C. All traffic on the Highway adjacent to plaintiffs' property would be carried to a height above the level of the roof of plaintiffs' building."; that the proposed action of defendants in laying the additional tracks will not only amount to unauthorized public nuisance, appropriate property held in trust for public purposes to private use and benefit, create an obstruction and hazardous situation necessitating an unlawful expenditure of public funds to promote private ventures, but will amount to a taking of plaintiffs' property without compensation and without due process of law, contrary to the Constitution and laws of Florida.

The plaintiffs prayed for the issuance of an injunction restraining further proceedings for the laying of additional railroad tracks across said Highway, and from constructing any bridge, trestle, overpass or viaduct over any portion of the Highway at any point where said Highway abuts upon the property of plaintiffs, and from raising or changing the elevation of said Highway at any point where said Highway is adjacent to the said property of plaintiffs. Temporary injunction was issued on November 13, 1955, as prayed for.

The State Road Department answered the bill saying:

1. These defendants deny each and every allegation contained in the said Bill of Complaint and demand strict proof thereof.

2. That any proposed construction by the State Road Department of Florida is necessary and essential to the best interests of the public.

3. That any proposed use of the Highway by the State Road Department of Florida is for Highway purposes.

4. That no property of the plaintiffs is being taken, invaded or injured.

The Railroad and the Paper Company answered the Bill of Complaint, and only so much thereof is set forth as is necessary to show the issues presented, as follows:

3. They admit that the defendant, St. Joe Paper Company, operates a paper mill west of the Highway, and that the entrance to the premises of said paper mill is across the Highway from the Plaintiffs' property. They admit that the paper mill is served by the defendant, the Apalachicola-Northern Railroad Company.

4. They deny jointly and severally, each and every of the other allegations contained in said complaint.

Motions for Summary Judgment were made by the defendants, and on November 2, 1954, the Circuit Judge made his order on the Motions, saying:

"Ordered, adjudged and decreed that it is undisputed from the record that the proposed project does not take any of the Plaintiffs' land or premises, and it further appears undisputed from the exhibits on file that the eighteen (18) feet remains between Plaintiffs' property and the proposed overpass and the present pavement on said eighteen (18) feet will remain undisturbed.

"The Court is of the opinion that from the the averments of the Bill of Complaint, the construction of the project will materially damage only the consequential rights of the Plaintiff to ingress, egress, light, air, and view, but under circumstances justifying the payment of appropriate compensation to plaintiff; thus the court is of the opinion that the bill has equity and the various motions for a summary judgment should be denied."

On the petition of the defendants in said cause for writ of certiorari, the Supreme Court considered the above order of the Circuit Court, 79 So.2d 699, 700, and on January 28, 1955, made the following ruling:

"The history of this litigation and the pertinent facts are set forth in the dissenting opinion of Chief Justice Mathews in this cause. We are of the view that the sole question presented in the petition for certiorari is whether or not the lower court committed error when it denied the motion for summary final decree. Inasmuch as there appears to be a material issue

> of fact created by the complaint and the answer of the State Road Department, it would be improper to quash the order of the chancellor at this point in the litigation. Certiorari, which is directed solely to the denial of a motion for summary final decree, is denied."

A re-hearing of the Certiorari proceeding was had and denied by the same vote of the Justices, and therein Mr. Justice Hobson wrote:

> "Because I do not consider this case to be before us on the merits I vote to deny the Petition for Re-hearing. The only question presented is:
>
> Did the Circuit Judge err in denying the motion of Petitioners for the entry of a summary final decree? It appears to me that if the matter were here upon the merits our pronouncements in the case of Bowden v. [City of] Jacksonville, 52 Fla. 216, 42 So. 394, as suggested in the opinion prepared by Mr. Chief Justice Mathews, would be controlling."

Mr. Chief Justice Mathews wrote an opinion in the certiorari proceeding, and another on the motion for rehearing. All three of these opinions now appear in the case of State Road Dept. of Florida, etc. v. Lewis, Fla., 79 So.2d 699.

On Aug. 29 (should be 19), 1955, plaintiffs asked for permission to amend the complaint by adding to paragraph 21 the following:

"The desirability of constructing the proposed overpass is the direct and proximate result of the failure of the State Road Department to comply with its clear, mandatory duty to protect and conserve S. R. 30 (U. S. 98) and of the carelessness and stupidity of the Defendants St. Joe Paper Company and the Apalachicola-Northern Railroad in laying the St. Joe Paper Company's wood yard and switching tracks perpendicular to S. R. 30 (U. S. 98) and in otherwise improvidently, carelessly and negligently constructing the aforesaid tracks and wood yard; that the defendants are guilty of malice, negligence and unskilfulness and of gross abuse of discretion in the proposed use and improvement of the aforesaid S. R. 30 (U. S. 98), to-wit, the Apalachicola Railroad, falsely acting under color of authority from the State Road Department and in collusion with the aforesaid State Road Department and St. Joe Paper Company, has negligently and unskilfully used the aforesaid public highway and has wilfully appropriated same by laying five (5) additional tracks across S. R. 30 to convey pulpwood to the premises of the St. Joe Paper Company's mill at Port St. Joe, Florida, when, in truth and in fact, the aforesaid five tracks are wholly unauthorized and constitute both a public and private nuisance, the acquiescence of the State Road Department in the laying of these tracks constitutes a gross abuse of discretion on the part of the said State Road Department, and only (1) track is neccessary fully and adequately to meet the requirements of the St. Joe Paper Company's mill at Port St. Joe, Florida; The

construction of the proposed overpass by the State Road Department is a gross abuse of discretion on the part of the State Road Department."

The motion to amend was granted in these words:

"That the plaintiffs' Motion to Amend filed August 18, 1955, be and the same is hereby granted and the plaintiffs in the proof of the allegations of carelessness, negligence, malice and unskilfulness or of gross abuse of discretion shall be limited in their testimony as to the proof of the factual matter alleged in said Motion to amend."

It was understood that the previous answers applied to the amendment.

On August 19, 1955, the Circuit Judge appointed W. K. Whitfield Special Master to take and reduce to writing the testimony and proofs offered, and present same to the court with his conclusions of law and facts therein involved, together with recommendations for appropriate decree.

The Special Master made his report and findings, from which we set forth the following:

"Neither the two existing tracks nor the proposed additional tracks crossing the Highway touched or abutted in any way plaintiffs' property.

"The State Road Department has decided to construct an overpass on State Road No. 30 (U. S. 98) over the railroad tracks near plaintiffs' property. It is contended by plaintiffs that if such an overpass was constructed it would cause plaintiffs damage by diverting traffic away from plaintiffs' place of business and would deprive plaintiffs of light, air and view, and would greatly depreciate the value of plaintiffs' property and the business operated thereon.

"The pleadings in this case and the testimony offered by plaintiffs conclusively show that neither the additional railroad tracts proposed to be installed by the Apalachicola-Northern Railroad nor the proposed overpass or viaduct would take, or abut upon, any of the land of plaintiffs. The overpass or viaduct would be constructed at least eighteen (18) feet from plaintiffs' property and the plans for the overpass call for an eighteen (18) foot street leading to plaintiffs' property. The testimony is that the proposed improvements would not take away from plaintiffs the right of ingress and egress to and from their property; however, the testimony does show that the ingress and egress would not be as convenient as at present.

"Plaintiffs contend (1) that the granting of a permit to lay additional tracks across State Road No. 30 is unauthorized and unlawful and constitutes an abuse of discretion on the part of the State Road Department of Florida, and diverts the use of a public highway to a private

use; (2) that the construction of the proposed overpass is primarily for the benefit and accommodation of St. Joe Paper Company and would only incidentally benefit the traveling public; (3) that the construction of the proposed overpass would amount to an unlawful expansion of the public highway for the use and benefit of one abutting owner, and by permitting such use of the highway the State Road Department is guilty of malice as a matter of law against the other abutting property owner. Lastly it is contended that the construction of the overpass involves unlawful expenditure of public funds."

"The relief sought by the plaintiffs was to permanently enjoin the defendants from proceeding with the installation of additional railroad tracks and the construction of the overpass until it was determined (1) that plaintiffs were entitled to damages, (2) that the amount of damages be assessed, and (3) to force the defendants to pay to plaintiffs the consequential damages from the construction of the overpass causing a change of grade in the highway."

"I find from the evidence that the State Road Department proposes to build the overpass for the safety and convenience of the traveling public. In building the overpass the plaintiffs will suffer damages from that consequence by reason of the fact that their light, air and view will be at least partially obstructed and there will be some diversion of vehicular traffic, particularly thru traffic, The St. Joe Paper Com-

pany and the Apalachicola Northern Railroad will receive some indirect benefits in that the overpass will permit the free passage of railroad cars underneath without hindrance from vehicular traffic. It will also permit the switching of railroad cars under the overpass without fear or concern for vehicular traffic passing overhead, which will eliminate the installation of expensive danger and warning signals."

"Law of the Case"

"The primary question to be determined is:

"Have the plaintiffs alleged and proved facts and circumstances sufficient to bring them within the exception to the established law that an abutting owner has no right of action for consequential damages occasioned by an authorized change of grade of a street or highway?"

"The Supreme Court of Florida has said on many occasions that a governmental authority was not liable for consequential damages to an abutting land owner caused by an authorized altering of the grade of a street. See Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394; Dorman v. City of Jacksonville, 13 Fla. 538; Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 [14 L.R.A. 370]; Gold v. City of Tampa [100 Fla. 1134], 130 So. 914; Natural Gas & Appliance Co. v. Marion County, Fla., 58 So.2d 701; and Duval Engineering & Contracting Co. v. Sales, Fla., 77 So.2d 431.

"The State Road Department has wide discretionary powers with reference to maintaining state roads and projects and to make them safe for public use. See Section 341.24, Florida Statutes Annotated. Furthermore, Chapter 29965, Laws of 1955, F.S.A. §§334.01 et seq., 335.01 et seq.; 336.01 et seq., 337.01 et seq., 338.01 et seq., 339.01 et seq., declares the public policy of the State of Florida with reference to the public road system and makes the State Road Board the custodian of the state highway system with power to plan, develope, operate, maintain and protect the highway facilities of the State for present, as well as for future use, subject only to the limitations of the Constitution and the legislative mandate hereinafter imposed, thereby giving to the State Road Department all lawful power and authority to plan, maintain and control the State Highway System.

"In this case, the State Road Department has determined that it would be to the best interest of the public in general to construct the overpass or driveway complained of by the plaintiffs." Citing and quoting from the case of State of Florida v. Florida State Improvement Commission, Fla., 75 So.2d 1, 3. A portion of the quotation is as follows:

"The authority of the administrative agencies to whom is entrusted these governmental functions is limited only by the lawful exercise of their discretion. Within their respective areas of authority these public agencies exercise their

discretion to devise plans and select sites to best serve the public need. When the plans adopted by such agencies do not exceed their lawful authority they should be upheld because the Court will not substitute its judgment for that of administrative agencies."

"There is no testimony tending to show that the action taken by the State Road Department is arbitrary or capricious. There is no showing of malice, negligence or abuse of discretion. In fact, the testimony shows that the State Road Department planned to build the overpass prior to the time that the Apalachicola-Northern Railroad was permitted to install additional tracks on State Road No. 30."

"I am of the opinion, therefore, that the construction of the overpass and/or the authorized change in grade of the roadway near plaintiffs' property has been authorized by the proper administrative board having control of the public highways of this state."

"I am further of the opinion from the testimony that the necessary change in elevation caused by the construction of the overpass will damage the consequential rights of the plaintiffs to light, air and view, and will divert considerable traffic from passing plaintiffs' property on the same level as at the present time. Since the construction of the overpass has been legally authorized it constitutes a lawful use or improvement of the street or highway and, under the law as

announced by the Supreme Court in the Bowden case and similar cases, the change of grade of the street is not a taking or an appropriation of private property within the constitutional guaranly against such taking or appropriation without compensation, even though the rights of light, air and view, and the diversion of traffic are destroyed. This is under the doctrine of damnum abeque injuria. The court speaks of such damages as 'consequential damages' meaning that they are simply the consequences of a legal act and therefore not basis for recovery in the courts, nor a lawful claim for compensation."

"In answering the questions propounded by plaintiffs in their brief, it is my opinion that the construction of the overpass does not proceed from the laying of additional tracks as maintained by plaintiffs. It proceeds from a matter of public safety and welfare."

"Plaintiffs contend that the laying of additional tracks is unauthorized and unlawful, and the construction of the proposed overpass is not a mere consequence from the lawful use and improvement of the street as a public highway. This contention has no merit and is not supported by the testimony in the record. * * *"

"The Special Master found that there was no merit in the contention of plaintiffs that the construction of the proposed overpass is primarily for the benefit of St. Joe Paper Company and only incidentally for the benefit of the traveling

public; and also, that there was no merit to the contention of plaintiffs that the construction of the proposed overpass proceeds from the negligence of St. Joe Paper Company in placing its wood yard at right angles to the Highway instead of parallel thereto; and also, that there was no merit to the contention of the plaintiffs that the construction of the proposed overpass proceeds from the unlawful appropriation of a public highway by one abutting owner thereon, condoned by and participated in by the State Road Department, thus constituting malice as a matter of law; and that the testimony does not support these contentions.

"In conclusion it is my opinion that the testimony does not support the allegations of the amended complaint that the defendants are guilty of malice, negligence, carelessness and unskilfulness or of gross abuse of discretion; and therefore, there would be no unlawful expenditure of public funds. * * *"

In his Final Decree the Circuit Judge overruled all exceptions to the Report and Recommendations of the Special Master, and confirmed the same, and stated in said Final Decree:

3. That the proposed construction by the defendants of the overpass, bridge, trestle, or viaduct and change in elevation of grade in State Road No. 30, herein sought to be permanently enjoined, are found by the Court to have been duly authorized by the proper administrative

agencies of the State of Florida acting within their lawful authority and discretion to construct viaducts and to change the grade of highways and street, and that such authorization is found not to be arbitrary or capricious, but to have been obtained without malice, negligence or abuse of discretion; that the construction of said overpass or viaduct and change in grade is found to constitute a lawful use or improvement of the street or highway involved and that any damages sustained by plaintiffs as a result thereof are found to be incidental to a lawful use by defendants of the street or highway and consequently are found not to be compensable.

"4. That the proposed construction herein sought to be permanently enjoined is found not to deprive plaintiffs of their right of access to the existing street or highway, and that any diversion of traffic from the property of the plaintiffs, and any impairment of the plaintiffs' right to light, air, or view, resulting from such construction is found to be an incidental result from a lawful use or improvement by defendants of the street or highway in question; that defendants' proposed construction of an overpass, bridge, trestle, or viaduct, and proposed change in grade of the street or highway are found not to constitute a taking, or appropriation of plaintiffs' property, nor an unlawful entry, invasion or trespass thereon; and that the plaintiffs are therefore found not entitled to any compensation as prayed for in their bill of complaint as amended.

"5. That the defendants are found to have been guilty of no malice, negligence, carelessness, unskilfulness or gross abuse of discretion; and that the action here sought to be permanently enjoined is found to involve no unlawful expenditure of public funds.

"6. That the facts proved herein show no unlawful diversion of the street or highway involved from proper street or highway purposes.

"7. That the temporary restraining order heretofore entered herein on the 13th day of November, 1953, be, and the same is hereby vacated, and set aside, and the injunction therein granted is hereby dissolved.

"8. That the equities of this case are found to be with the defendants and against the plaintiffs, and that plaintiffs' bill of complaint herein, as amended, be and the same is hereby dismissed."

The Final Decree was signed March 7, 1956, and Recorded in Chancery Order Book 59, page 91. An Appeal was taken by the plaintiffs from said decree. Several assignments of errors were made, but inasmuch as the contentions of plaintiffs are set forth in the report of the Special Master, it is not deemed necessary to set forth here more than the first assignment, which is a follows:

"(1) The court erred in entering its final decree herein bearing date the 7th day of March, 1956 and recorded in the records of the above styled court in Chancery Book 59, page 91."

There is substantial evidence in the record to support the findings of the Special Master, which have been accepted and confirmed by the Circuit Judge, and also, to support the Final Decree.

The Special Master having found that the State Road Department acted with lawful authority, and that the testimony does not show that the defendants are guilty of malice, negligence, carelessness and unskilfulness or gross abuse of discretion, and the Circuit Judge having approved the report of the Special Master, the quotation from State Road Department v. Lewis, 79 So.2d at page 703, is now approved and is decisive of this case:

> "No property of respondents is entered or taken. As shown by this record, the overpass is to be constructed for the safety of the travelling public. In the case of Bowden v. City of Jacksonville, supra, this court said: 'As incidents to the ownership of a lot bordering on a public street, there are, in addition to the right of passage over the street in common with the public, the private property right of egress and ingress from and to the lot by way of the street and the private property right of light and air which the street affords. The owner of such a lot takes and holds it subject to the right of the state, or any duly authorized governmental agency acting for it, to improve the street for public use by altering the grade of the street, by the erection of a viaduct thereon, or otherwise, for street purposes; and, in the absence of legislation or a valid contract the owner has no right of action against a city authorized by law to

grade and improve the street for injury to the lot or property thereon, or for the impairment or destruction of the incidental rights of ingress and egress and of light and air which the street affords, because of changes made by the city in the grade of such street by building or rebuilding a viaduct thereon for the improvement of such street, even though such changes in the grade prove inconvenient or expensive to the lot owner in the use of his property, where there is no diversion of the street from its proper street purposes, and where the injury to the lot or property thereon or the impairment or destruction of the incidental rights is a mere consequence from the lawful use or improvement of the street as a highway, and where there is no physical invasion of or trespass upon the lot or property, and no malice, negligence, or unskilfulness in the use or improvement of the street for street purposes to the injury of the lot owner. See Dorman v. City of Jacksonville, 13 Fla. 538; Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 [14 L.R.A. 370]."

See also, the case of Weir v. Palm Beach County and State Road Department of Florida, Fla. 85, So.2d. 365; and cases cited above in the Report of the Special Master.

The decree appealed from is affirmed.

TERRELL, C. J., and HOBSON, ROBERTS, DREW and THORNAL, JJ., concur.

THOMAS, J., not participating.

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Supreme Court of the United States

OCTOBER TERM, 1957

NO. 595

H. B. LEWIS and D. M. LEWIS, co-partners, trading and doing business as M. G. LEWIS AND SONS GARAGE, and D. M. LEWIS, as executor of the estate of M. G. LEWIS deceased.

Petitioners,

v.

THE STATE ROAD DEPARTMENT OF FLORIDA et al., THE APALACHICOLA-NORTHERN RAILROAD, a Florida corporation, and the ST. JOE PAPER COMPANY, a Florida corporation,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1957

NO. 595

H. B. LEWIS and D. M. LEWIS, co-partners, trading and doing business as M. G. LEWIS AND SONS GARAGE, and D. M. LEWIS, as executor of the estate of M. G. LEWIS deceased.

Petitioners,

v.

THE STATE ROAD DEPARTMENT OF FLORIDA et al., THE APALACHICOLA-NORTHERN RAILROAD, a Florida corporation, and the ST. JOE PAPER COMPANY, a Florida corporation,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review a judgment of the Supreme Court of Florida which affirmed a decree of the Circuit Court of the 2nd Judicial Circuit in and for Leon County, Florida, dissolving a temporary injunction entered by the Circuit Court and dismissing the case.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3) on the grounds a right and privilege are claimed under the Constitution of the United States. Jurisdiction is generally invoked by this Court under that provision of law where the state court

has decided a Federal question of substance not theretofore determined by this court or decided it in a way probably not in accord with the applicable decisions of this court. The question presented in the petition assumes facts contrary to the findings of the Special Master, the decree of the Circuit Court and the opinion of the Supreme Court of Florida and therefore was not presented or decided by the Special Master or the courts. The Federal question decided by the Supreme Court of Florida, has heretofore been determined by this court a number of times and was decided in a way in accord with the applicable decisions of this court. Objections to the jurisdiction of the court duplicate a part of the argument in the brief in opposition and for the sake of brevity will not be repeated here.

QUESTION PRESENTED

The petitioners' question assumes that an obstruction of the public highway for private use by one abutting owner necessitated the change in grade in front of the petitioners' property by the respondent State Road Department of Florida. The report of the Special Master, the decree of the Circuit Court and the opinion of the Supreme Court of Florida determined that this factual situation did not exist, but to the contrary, affirmed that the construction of the overpass involved no physical invasion of the petitioners' property and was a lawful change in grade obtained without malice, negligence, abuse of discretion or diversion of the highway from highway purposes and that any damages sustained by the petitioners as a result thereof were incidental to a lawful use of the street or highway. (Appendix B to Petition for Writ of Certiorari, Pages 31, 32, 33) Therefore, the only Federal question of substance that could have been decided by the state court is:

Is an abutting land owner deprived of his constitu-

tional guaranty against the taking of his property without due process of law when he is not compensated for consequential damages to light, air, view and access occasioned by an authorized change in grade of a street or highway.

STATEMENT

The opinion below, set forth in its entirety beginning on Page 18 of the Appendix to the Petition for Writ of Certiorari, contains a fair and complete statement of the case and may be summarized as follows.

The Respondent State Road Department of Florida, the proper administrative agency, acting within its lawful authority proposed to construct an overpass. The construction of the overpass involved no physical invasion of the petitioners' property. The decision was not arbitrary or capricious and involved no malice, negligence, or abuse of discretion on the part of the respondents. The petitioners contended the consequential injuries sustained by them would result in depriving them of property without due process of law. The construction of the overpass constituted a lawful use or improvement of the highway involved and the damages sustained by the petitioners as a result thereof were incidental to a lawful use of the highway. Under the circumstances, the change in grade of the highway did not constitute a taking or appropriation of petitioners' property and any damages as a result thereof were not compensable.

ARGUMENT

I.

Construction Of The Overpass Was For A Public Purpose

Petitioners in their argument contend that the construction of the overpass was occasioned by the obstruction of a public highway for a private use by one abutting owner.

The Special Master, after hearing all the testimony, found this contention was without merit and was not supported by the evidence. He further made an affirmative finding that the construction proceeded from a matter of public welfare and safety. (Appendix B to Petition for Writ of Certiorari, Pages 30, 31). Both the Circuit Court and the Supreme Court of Florida affirmed these findings of the Master on the grounds that they were supported by substantial competent evidence. The Supplemental Appendix to appellees' brief, hereinafter referred to as "S.A." reveals substantial competent evidence contrary of the petitioners' contention that the construction was for a private purpose and contrary to his statement that the State Road Department never considered constructing an overpass over the two original tracks.

George L. Dickinson, District Engineer for the District, testified:

> "We had planned to build the overpass before the question of permitting the tracks to be laid came up." (S.A. 46)
>
> "The Road Department had planned to build the overpass before Mr. Sharit requested permission to l[a]y these additional tracks.
>
> Q. Was there considerable time before he requested permission of you to lay these additional tracks?
>
> A. As I remember, it was in July before he asked for that authority." (S.A. 47)

Richard H. Simpson, Chairman of the Road Board and Road Board member from the district confirmed the testimony of Mr. Dickinson that the Road Department had decided to build the overpass prior to the request for the laying of additional tracks and that the construction of the overpass was for a public purpose, saying:

> "The first time that I had a request for building the overpass was at Chipley, Florida. That was early in

1953, probably in January. It was at the annual meeting called to hear requests for road building budgets for this district. After the Gulf County Commissioners made their requests for roads, they brought up the matter of the overpass at Port St. Joe and asked that it be considered in the primary budget for 1953. In addition to this request we had a resolution from the City Council of Port St. Joe and a resolution of endorsement from, I believe, the Kiwanis Club and also the Rotary Club at Port St. Joe. All of these resolutions stated the need for this overpass from the standpoint of the safety and convenience of the citizens of Port St. Joe and Gulf County. At this particular time the Road Department had on hand considerable Federal money and there was a material shortage of state money. For this reason this was an ideal time to build a structure in which the Federal Government would participate to a large extent. The matter of finances and the matter of requests from substantial citizens of Gulf County and after a survey by our own engineers and their recommendations, we felt that this was a worthy project for construction by the State Road Department.

Q. Is the reason for the additional contribution by the railroad occasioned by the overpass crossing more tracks than originally was intended?

A. That's correct." (S.A. 26, 27)

Mr. Charles Hopkins, Engineer of Federal Aid with the State Road Department, testified that the Federal Aid engineers had examined the site and plan for the proposed overpass and recommended approval. (S.A. 35) He further testified that the Federal Government would not participate in the cost of construction of an overpass if they did not think it helped public safety and convenience or if they determined the overpass served a private project or private business instead of the public and that they

had taken all of these factors into consideration in the program stage prior to their recommended approval. (S.A. 36, 37)

Mr. William B. Dean, Assistant State Highway Engineer, testified that there would be no appreciable difference in the height of the abutment in front of the petitioners' property for an overpass constructed over the two original tracks and the proposed overpass which extended over the additional tracks. (S.A. 32)

The testimony of these witnesses and of Mr. William F. Hankins (S.A. 40) reveal that the original tracks constituted a hazardous crossing which was located on U.S. Highway 98 and that the construction of the overpass was occasioned for the public purpose of eliminating an extremely hazardous crossing for the benefit, safety and convenience of the public.

II.

Certiorari Is Not Granted To Review Facts.

The decision of the Court below is correct and there is no basis for further review. As this Court has stated:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 45 S.Ct. 496, 497; 268 U.S. 220, 227.

The general rule as stated by this court many times is that findings of fact are conclusive on writ of error to a state court unless there is no evidence to support the findings or uncontradicted evidence contrary to the findings. *Ward and Gow v. Krinsky*, 42 S.Ct. 529; 259 U.S. 503; 66 L. Ed. 1033. *Baltimore & O.S.W.R. Co. v. Burtch*, 44 S.Ct. 165; 263 U.S. 540; 68 L. Ed. 433.

On a writ of error to a state court it is not the province of the Federal Supreme Court to weight conflicting evi-

dence where the record shows testimony supporting the verdict. *Great Northern Ry. Co. v. Donaldson,* 38 S.Ct. 230; 246 U.S. 121; 62 L.Ed. 616.

Not only is the finding of the Master and state courts that the construction of the overpass was for a public purpose supported by ample evidence but we submit that petitioners' contentions are without support in the record.

III.

Petitioners Are Not Deprived Of Property Without Due Process Of Law When Not Compensated For Consequential Injuries

In the absence of statutory authority, consequential losses are not compensable under the due process clause of the Federal Constitution. The due process clause refers only to direct appropriation and not to consequential injuries resulting from the exercise of a lawful power. *Mitchell v. U.S.,* 45 S.Ct. 293, 294; 267 U.S. 341; 69 L.Ed. 644; *U.S. v. Meyer,* 113 F.2d 387, 398; Certiorari denied 61 S.Ct. 174; 311 U.S. 706; 85 L.Ed. 459.

As stated in the case of *U.S. v. Cox,* 190 F.2d 293, 295, 296; Certiorari denied 72 S. Ct. 107; 342 U.S. 867, 96 L.Ed. 652:

> "Just compensation for that which is taken does not include consequential losses to the owner. *Mitchell v. United States,* 267, U.S. 341; 45 S.Ct. 293; 69 L. Ed. 644; *United States v. Petty Motor Co.,* 327 U.S. 372; 66 S. Ct. 596; 90 L. Ed. 729; *United States v. Willow River Power Co.,* 324 U.S. 499, 510; 65 S.Ct. 761, 89 L.Ed. 1101; *United States v. Miller,* 317 U.S. 369, 376; 63 S. Ct. 276; 87 L. Ed. 336. 'Such losses may be compensated by legislative authority, not by force of the Constitution alone. *United States v. Willow River Co., supra,* 324 U.S. at page 510, 65 S. Ct. at page 767, 89 L.Ed. 1101.'"

IV.

There Is No Denial Of The Equal Protection Of Law To Petitioners

A few states by statute or constitutional provision require compensation for consequential injuries but the petitioners are not denied equal protection of law because such consequential injuries are not compensable under the law of the State of Florida. As this court said in the case of *Sauer v. New York,* 27 S.Ct. 686; 206 U.S. 536:

> "The Courts have modified or over ruled their own decisions and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose."

V.

Consequential Damanges Are Not Compensable Under Florida Law

The Supreme Court of Florida has said on many occasions that a governmental authority was not liable for consequential damages to an abutting land owner caused by an authorized altering of a grade of a street. *Bowden v. City of Jacksonville,* 52 Fla. 216; 42 So.394; *Dorman v. City of Jacksonville,* 13 Fla. 538; *Selden v. City of Jacksonville,* 28 Fla. 558; 10 So.457 (14 L.R.A. 370); *Gold v. City of Tampa* (100 Fla. 1134); 130 So.914; *Natural Gas & Appliance Co. v. Marion County, Fla.,* 58 So.2d 701; *Duval Engineering & Contracting Co. v. Sales, Fla.,* 77 So.2d 431; *Weir v. Palm Beach County and State Road Department*

of Florida, 85 So.2d 865; *Lewis v. State Road Department*, 95 So.2d 248.

VI.

The Federal Question Presented Is Neither Novel Nor In Conflict With The Applicable Decisions

This court has passed upon the exact question involved and has approved the Florida law as being no violation of the 14th Amendment in the case of *Sauer v. New York*, 27 S.Ct. 686; 206 U.S. 536. In this case a deadend street terminated at a bluff. A viaduct ascending to connecting streets atop the bluff was constructed in the deadend street resulting in a change in grade of the street in front of the plaintiff's property thereby impairing plaintiff's easements of access, light, air and view. Plaintiff contended he was denied the due process of law secured to him by the 14th Amendment and that his propert was taken without compensation. The Court held:

> "The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement, equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. *Selden v. Jacksonville*, 28 Fla. 558; 14 L.R.A. 370; 29 Am.St.Rep. 278; 10 So.457."

The citation of *Selden v. Jacksonville, supra*, by this court recognized the established law of Florida which has never been reversed or modified. The court further found that it was also the established law of the State of New York and held:

"Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th Amendment is shown."

In the case of *Selden v. Jacksonville, supra,* the Supreme Court of Florida held that the easements of access, light, air and view of an abutting owner are subordinate to the right of the state or any duly authorized governmental agency acting for it to alter a grade or otherwise improve a street for street purposes, and the guaranty of the Constitution that private property shall not be "taken" or "appropriated" without compensation does not extend to mere consequential damages resulting to property abutting on a street from a lawful change of grade of the street. In addition to the many cases cited in this brief holding that consequential injuries to property are not a taking without compensation under the prohibition of the 14th Amendment, this Court, in the cases of *Delaware River Joint Toll Bridge Commission et al v. Colburn, et al,* 60 S.Ct. 1039; 310 U.S. 419; and *Anselmo v. State of Connecticut,* 135 Conn.78; 60 A.2d 767; Certiorari denied 69 S.Ct. 132; 335 U.S. 859; held that the impairment of an abutting owner's easements of access, light, air and view resulting from a lawful improvement of a street or highway did not constitute a taking of the plaintiff's property in the constitutional sense. Recently, this court has consistently refused certiorari in similar cases presenting the question of whether consequential injuries to property are a taking without compensation under prohibition of the 14th Amendment. *U.S. v. Meyer,* 61 S. Ct.174, *supra; U.S. v. Cox,* 72 S.Ct. 107, *supra; Anselmo v. State of Connecticut,* 69 S.Ct. 132, *supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FORD L. THOMPSON

BRYAN W. HENRY
Counsel for Respondents

November....., 1957

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief in opposition to petition for writ of certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, has been served by mail upon Claude Pepper, Counsel for Petitioners, 37 N. E. First Avenue, Miami 32, Florida, this.....day of November, A.D. 1957.

FORD L. THOMPSON

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 595

H. B. LEWIS and D. M. LEWIS, co-partners, trading and doing business as M. G. LEWIS AND SONS GARAGE, and D. M. LEWIS, as executor of the estate of M. G. LEWIS, deceased,

Petitioners,

v.

THE STATE ROAD DEPARTMENT OF FLORIDA, *et al.*; THE APALACHICOLA-NORTHERN RAILROAD, a Florida corporation, and the ST. JOE PAPER COMPANY, a Florida corporation,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLAUDE PEPPER
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The respondents in their brief have shown no basis in the record for the holding by the Supreme Court of Florida, affirming the lower Court, that the construction of the overpass which has caused the petitioners the damage complained of in this case was not built to accommodate the expansion program of the St. Joe Paper Company, the abutting owner, on the opposite side of the road from petitioners.

The testimony of District Engineer George L. Dickenson partially quoted on page four of respondents' reply to the petition, is not to the contrary.

First, the Road Department speaks only through resolution of its governing Board recorded in its minutes. No action of the State Road Department officially taken to build an overpass over the two original tracks on account of any hazard of such crossing to the travelling public is shown anywhere by respondents in the record.

On the contrary, pursuant to the entreaty of Sharit for the Paper Company on January 18, 1952 (A. 85), to the Road Board to build the overpass so that it could occupy the highway and the land on the other side of it for its expansion program; pursuant to the further petition of Sharit for the Paper Company to a Road Board member, Simpson, in January of 1953, again for the Road Department to build the overpass to accommodate the Paper Company's expansion program; and pursuant to the further urging of Sharit for the Paper Company that the Road Department build the overpass to accommodate the Paper Company on January 30, 1953 (A. 91), the State Road Department acceded to the Paper Company's request and adopted its tentative budget for 1953 providing for an overpass at a cost of $300,000.00. (See exhibit attached to petitioner's Petition of May 18, 1957 to the Supreme Court of Florida to Remand Cause for the Taking of Further Evidence, filed with our petition for certiorari.) Up until that time the record is completely silent that Dickenson, Hopkins (the Engineer of Federal Aid), Dean (the Assistant Highway Engineer), or Hankins (another of respondents' witnesses in the lower Court), had entered the picture at all. And it should also be emphasized that Dick-

enson did *not* testify that the plan to build the overpass was not the result of the constantly reiterated importunities of the Railroad and Paper Co.

Obviously, this tentative budget became the final budget of the Road Department approved on February 26, 1953 (A. 67), which allocated sufficient funds to construct an overpass to clear *thirteen* tracks, and this approval of the tentative budget on January 30, 1953 by the State Road Department in response to the appeal by the Paper Company became the first official action of the Road Department authorizing the overpass.

Moreover, the record is silent in fact as to any traffic count or to any inquiry as to whether the pre-existing two-track crossing constituted a hazard. Indeed it was only after the Road Department considered the laying of the *additional* tracks that it determined that the contemplated crossing would constitute a hazard. (A. 67). And it was only after the State Road Department had resolved to build the overpass to accommodate the Paper Company and the Paper Company's Railroad submitted in detail plans as to the location of the tracks and their clearance, that the Federal Aid authorities determined that the Paper Company must pay all the cost of the overpass that would not have traversed the two original tracks if it had so been built.

After the State Road Department had resolved to build the overpass to accommodate the Paper Company, then the State Road Department sent official authorization to the Paper Company and to the Railroad to build the totally new track lay-out on October 21, 1953 (A. 113), and the State Road Department on October 30, 1953, ad-

vised counsel for the petitioners that the granting of such authority was "the first step toward the *erection* of the overpass." (A. 115). (Emphasis supplied).

What else could the Road Department have done but detour the road or build an overpass to accommodate the expansion program of the Paper Company as Sharit for the Paper Company requested of the Road Board on January 18, 1952 (A. 85) in view of the finding of the Special Master as to the following effect the expansion program of the Paper Company would have upon the character of the crossing?

> "It is anticipated that there will be at least *100 train crossings per day on account of the expansion program recently completed by the St. Joe Paper Co.* . . . which would make the crossing extremely dangerous for the traveling public." (A. 23). (Emphasis supplied).

It was the Paper Company's expansion program, not the increase in the volume of the travelling public, that made the crossing hazardous and required the building of the overpass. The Court need only examine the clear chronology of events in this case (A. 65-71) to come to the obvious conclusion that the Paper Co.'s expansion program was the proximate cause of the action taken by the Road Department which in turn was the proximate cause of the damage suffered by petitioners.

Hence, as we said in our original Petition, this is simply a case where the State Road Department used its authority to build and regulate the public highways to accommodate one abutting owner to its great benefit but to the ruin of the abutting owner across the road.

The principles of justice require that in such case the injured party be compensated.

Respondents' arguments on the points of law involved in this case are plainly irrelevant to the central issue, which is whether the Road Department authorized the construction program in question for the purpose of accommodating the private respondents, and if so, whether such action is violative of petitioners' rights under the Fourteenth Amendment. Respondents beg the question when they aver that the Road Department acted "within its lawful authority", for that is the very matter in dispute. Moreover, respondents' arguments concerning the matter of compensation for consequential injuries is beside the point, for those arguments assume that the damages suffered were consequent to a lawful taking for a *public* and not a *private* purpose. Finally, that this Court will review the record on certiorari is clear not only from *Norris v. Alabama*, 294 U.S. 587; 55 S.Ct. 579; 79 L.Ed. 1074 (1935), cited in our petition, but also from the very recent case of *Ferguson v. Moore-McCormack Lines*, 352 U.S. ___, 1 L.Ed.2d. 511, 77 S.Ct. ___ (1957).

Respectfully submitted,

CLAUDE PEPPER
Counsel for Petitioners

, 1957.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioners' Reply to Respondents' Joint Brief in Opposition To Petition for Writ of Certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, been served by mail upon MEGINNIS, THOMPSON & MORRISON, 123½ South Monroe Street, Tallahassee, Florida, attorneys for respondents, St. Joe Paper Co. and Apalachicola-Northern Railroad, and to BRYAN W. HENRY, Holland Building, Tallahassee, Florida, attorney for respondent State Road Department of Florida, this _____ day of _____, 1957.

_____

CLAUDE PEPPER